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IN THE

Supreme Court of the United States

October Term, 1975

75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

Petitioners

v.

Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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IN THE

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75-250

CITY OF CHARLOTTE, et al.,

Petitioners,

v.

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS

This Case raises the question whether a municipality is required, under the Fourteenth Amendment, to grant union dues check off to city employees who are members of a labor union, absent State or Federal legislation requiring it.

The questions presented involve whether the municipality has established a rational basis for denying dues check off, while permitting voluntary payroll deductions for programs considered to be employee fringe benefits.

This Case concerns the lower courts' application of the Equal Protection Clause of the Fourteenth Amendment to the denial, by a municipality, of union dues check off.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Western District of North Carolina is reported in 381 F. Supp. 500. The opinion of the U. S. Court of Appeals for the Fourth Circuit was entered on June 17, 1975 and is not reported. Copies of these opinions are appended to the Petition for Writ of Certiorari filed August 16, 1975.

JURISDICTION

This suit was brought under Title 28 of the United States Code, Sections 1331 and 1343 authorized by Title 42 U.S.C. 1983 for mandatory injunctive relief, and alleged violation of the First, Ninth and Fourteenth Amendments of the U. S. Constitution. This action was file in the District Court on October 2, 1973 (App. 3). The District Court granted summary judgment to plaintiffs [respondents in instant case], stating the Fourteenth Amendment applied under the facts of the case (A-13, Petition for Certiorari). On September 12, 1974, defendants [petitioners in instant case], noted their appeal in District Court (App. 57) and applied for a stay to the U. S. Court of Appeals for the Fourth Circuit. A stay of the mandates was granted pending application for certiorari to the U. S. Supreme Court (A-2, Petition for Certiorari). The jurisdiction of the U. S. Supreme Court was invoked under 28 U.S.C.A. 1254(1). Petition for certiorari was filed August 16, 1975 and certiorari was granted October 14, 1975.

QUESTIONS PRESENTED

1. Whether it is mandatory for a municipality to grant union dues check off, absent a statute requiring it, and whether denial thereof is a violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the City of Charlotte has established a rational basis for denying dues check off to City-employed firemen who are members of a labor union.

3. Whether North Carolina General Statute §95-98, which prohibits agreements between North Carolina municipalities and labor unions as bargaining agents for any public employee, would preclude the City of Charlotte from granting union dues check off.

4. Whether the findings of fact affirmed by the U. S. Court of Appeals for the Fourth Circuit were supported by the evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Amendments to the U. S. Constitution involved in this case are the First Amendment cited in Volume I, page XLVI of the U. S. Code, the Ninth Amendment cited in Volume I, page XLVII of the U. S. Code, and the Fourteenth Amendment cited in Volume I, page XLVII of the U. S. Code which provide as follows:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction at the District Court level was invoked under 28 U.S.C., Sections 1331 and 1343, and Title 42 of the U. S. Code, Section 1983 which provide as follows:

28 U. S. Code 1331

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U. S. Code 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any

right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

The statute of the State of North Carolina which is involved in this case is cited in Volume 2C, Section 95-98 at page 689 of the General Statutes of North Carolina which provides as follows:

North Carolina General Statute 95-98

Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or

agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.

STATEMENT OF THE CASE

This controversy arises out of a claim by City-employed firemen that the City of Charlotte and its Council members have, on request, approved payroll deductions from their wages for insurance payments, savings plans and charitable contributions, but have arbitrarily refused to allow dues check off for the benefit of their union.

In granting Respondents' Motion for Summary Judgment, the U. S. District Court for the Western District of North Carolina ruled that so long as the City and its Council continued, without clearly stated and fair standards, to withhold money(s) from the paychecks of employees for purposes, organizations and entities not specifically required by law, the City was enjoined from denying dues check off to the firemen to be paid to Local 660, International Firefighters Association (A-14, Petition for Certiorari).

On appeal, the U. S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court (A-6, Petition for Certiorari).

STATEMENT OF THE FACTS

Petitioners in this case are the City of Charlotte, the Charlotte City Council, and members of the City Council as such and individually, (hereinafter referred to as the "City").

Respondents are City-employed firemen serving as officers of Local 660, International Firefighters Association, an unincorporated labor organization, and individually, (hereinafter referred to as "Union Officers").

Since 1970, a majority of the City's uniformed firemen have been members of Local 660. In February of 1974, 351 of the 543 uniformed firemen were dues-paying members of the union (App. 46). Local 660 and the Union Officers have requested dues check off from the City almost every year since 1969 until the time of this action (App. 43, 44). Their requests have been denied because dues check off does not fall within the guidelines of the City's policy regarding payroll deductions (App. 55). Since 1968, the City has consistently denied dues check off requests to three other labor organizations and the North Carolina State Firemen's Association. Numerous commercial organizations have also been refused payroll deductions (App. 43-45).

The Attorney General of North Carolina rendered an opinion to a City Councilman in 1969 that dues check off was a segment of a collective bargaining agreement with a labor union; therefore the City was expressly prohibited by North Carolina General Statute 95-98 from making any check off from its employees' wages for the purpose of paying union dues (App. 38-41, Ex. 4).

In addition to the payroll deductions required by Federal and State law, it is the policy of the City to permit payroll deductions which directly benefit all City employees (App. 54). The City has also permitted payroll deductions for employees within the Fire Department for the Firemen's Credit Union, Firemen's Benefit Fund-Lincoln National Life and the Firemen's Voluntary Pledge Fund (App. 16, 17). Withholding of employees' wages is regarded as a fringe benefit, and each request for withholding is considered in order to determine whether or not City employees would be benefited by the deduction, and whether such a benefit would outweigh the administrative burden and expense which would be imposed on the City. Without some restriction, this burden would be substantial (App. 44, 45).

In accordance with its policy, the City permits payroll deductions for the following items: (App. 16, 17)

(a) Federal income tax (required by law)
(b) State income tax (required by law)
(c) North Carolina Firemen's Retirement System (required by law) (App. 33, Ex. 1, 35)
(d) North Carolina Local Government Employees' Retirement System (required by law) (App. 33, Ex. 2, 36)
(e) Medical Insurance (App. 18—Contract)
(f) Life Insurance (App. 18—Contract)
(g) U. S. Savings Bonds
(h) United Way—Mecklenburg-Union Counties (App. 18)
(i) Firemen's Benefit Fund—Lincoln National Life Insurance
(j) Firemen's Credit Union
(k) AEtna Deferred Compensation Plan (App. 34)
(l) Fire Department's Voluntary Pledge Fund (Petition for Certiorari p. 9)
(m) City-County tax Levy (required by law Ex. 3, App. 37)
(n) State tax levy (required by law Ex. 3, App. 37)

Some time during 1973, Local 660 and the Union Officers began negotiations to obtain a group life insurance plan for its members. The Union Officers alleged that two life insurance companies so contacted advised they would be unwilling and unable to offer such a plan until the union members were afforded voluntary dues check off by the City of Charlotte (App. 23, 25).

The Union Officers, as City employees and firemen, already have a medical insurance plan and two life insurance plans available to them (App. 16 (e), (f), and (i)).

In October of 1973, the Union and its officers filed a complaint in the U. S. District Court, alleging that the City and its Councilmen have engaged in a pattern and practice of refusing to check off union dues from Local 660 members who are employees of the City Fire Department, while withholding moneys from Fire Department employees for such items as insurance payments and charitable contributions. Local 660 and its officers alleged that this arbitrary and capricious practice violated their rights under the First Amendment to the U. S. Constitution to freedom of speech, freedom of assembly, including their rights to organize, petition and bargain for rights and privileges of employment; and also violated rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment (App. 5). It was further alleged that the failure to allow dues check off by the City impinged on their rights to associate together for the purpose of obtaining group life insurance and retaining legal counsel (App. 25, 51).

The City denied that its refusal to grant union dues check off was a violation of any constitutional provision, but instead was an exercise of sound discretion inherent in a municipality and its governing body. The City further denied that the classification of items which might be deducted from employees' wages was arbitrary or capricious, but was a reasonable classification of deductions which might be made from employees' pay (App. 8, 10).

All parties filed motions for dismissal and for Summary Judgment.

Union Officers presented evidence that the current union dues were $4.00 per month, and if union members were allowed check off, they would be able to purchase life, major medical and other insurance, hire legal counsel, join together in other associational activities for the betterment of the community and pay its officers a salary (App. 51, 52).

On September 5, 1974, the District Court entered its Findings of Facts, Conclusions of Law and Order. The Court found that refusal of the City to check off money for the benefit of Local 660 when requested to do so by the union members, constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. Local 660 was dismissed as a party plaintiff as the Fourteenth Amendment applied only to the individual union officers (A-12, A-13).

The Court found further that, although the City had no written guidelines, it had established a practice of allowing withholding of payroll deductions when the benefit was available to all employees and employees within a single unit such as the Fire Department. The City was enjoined from refusing to check off dues so long as the City, without clearly stated and fair standards, withheld moneys from paychecks of City employees for other purposes and organizations not specifically required by law (Petition for Certiorari, p. A-10, A-14).

On appeal, the U. S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court (Petition for Writ of Certiorari, p. A-3).

A stay of the mandates was granted pending application of the City for a Writ of Certiorari to this Court (Petition for Writ of Certiorari, A-1).

Petition for certiorari was filed on August 16, 1975, and certiorari was granted on October 14, 1975.

SUMMARY OF ARGUMENT

Union dues check off has historically been considered a negotiable item in a collective bargaining agreement between an employer and a labor union. Absent a statute requiring check off, a municipality is not required to grant dues check off to municipal employees who are union members.

The lower courts' application of the Equal Protection Clause of the Fourteenth Amendment to the granting of

union dues is erroneous and in effect, creates a substantive right having no constitutional foundation. Refusing to permit dues check off to the Union Officers does not deprive them of any constitutionally-guaranteed right, and therefore is not a violation of any constitutional provision. Dues check off is a privilege which may be bestowed or withdrawn by an employer, even a public employer, for there is no state or federal legislation requiring it.

Nevertheless, the City has established a policy with respect to voluntary payroll deductions which satisfies the constitutional requirements for rational classification.

The decision in this case will have a far-reaching effect in the field of employer-employee relations and labor negotiations in all parts of the United States.

ARGUMENT

I. It is not Mandatory for a Municipality to Grant Dues Check Off, Absent a Statute Requiring It, Nor is Denial Thereof a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The question raised by the Union Officers who are the respondents in this case, has never, insofar as the City can determine, been considered by this Court. It is simply whether municipal employees who are union members have a substantive right to dues check off because their employer has a policy of permitting voluntary withholding of wages for insurance premiums and similar purposes as employee fringe benefits.

A. Dues Checked Off is a Privilege—Not a Constitutionally Protected Right.

The District Court in deciding this case concluded that the Union Officers have no right *per se* to have moneys withheld

from their paychecks for the benefit of Local 660, but once the City offered the benefits of withholding to certain organizations and entities, then under the Fourteenth Amendment, the City must administer the program in a fair and equitable manner (A-12, Petition for Writ of Certiorari). The Court has, by this decision, given constitutional protection to dues check off, thereby creating a substantive right. Check-off is a privilege to be bestowed or withdrawn. Even Congress, in enacting the National Labor Relations Act, made dues check off a matter of negotiation between the parties, and not mandatory.

The U. S. District Court for the Southern District of Georgia considered this subject in *Strojny v. Rousakis,* 88 L.R.R.M., 2458 (1974), where firemen employed by the City of Savannah brought suit against the Mayor and Aldermen for withdrawing check off privileges. The suit was brought under 42 U.S.C. §1983 and sought appropriate injunctive relief. Chief Judge Alexander V. Lawrence denied their preliminary injunction and dismissed the case. In his opinion and order, Judge Lawrence commented on both the litigation before his court and the Charlotte litigation and said:

"It strikes me that §1983 cases such as this and the Charlotte litigation present more of the trappings of federal jurisdiction than substance. The First Amendment right of public employees to organize is now fairly well established. But the check off of dues or deductions from pay checks, in the absence of statute or contract, is a mere privilege. It is a concession that may be bestowed or withdrawn at will by the governmental entity concerned. In effect, what plaintiffs contend is that the check off privilege is metamorphized into a constitutional right when it is arbitrarily withheld or unequally dispensed by the municipality. The Equal Protection clause does not confer new or substantive rights upon citizens. 'It is not the province

of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.' *San Antonio Independent School District v. Rodriquez,* 411 U. S. 1, 33."

"Members of a labor organization who are employed by a municipality possess no constitutional right to have union dues deducted from payroll checks and there is no corresponding obligation by the employer to grant or to continue the check off privilege. The fact that it is accorded to other organizations and entities for varying purposes does not render its withdrawal discriminatory . . ."

Another well-reasoned opinion on the issue of dues check off for public employees is that of Judge Geselle in *American Federation of Governmental Employees v. Hampton,* (D.D. C.) 77 L.R.R.M. 2977 (July 22, 1971), in which he stated:

"Arguments to the Court that something is against the interests of humanity, that in some way it is morally wrong, that it shouldn't happen in good union relations and questions of that sort are not for the courts. Congress could clearly make dues check off mandatory by a stroke of the pen if it wanted to do so. It hasn't done so. The statute is purely permissive. Congress has not affirmatively directed dues check offs."

". . . [I]t is not the function of the Court to interfere unless there appears to be . . . evidence of substantial interference with basic rights by arbitrary and capricious action or action that precludes clear constitutional guarantees."

". . . It appears to the Court that the remedies that the Plaintiffs are seeking are not in the courts but they must be addressed to the Executive and to the Legislature."

"The right of unionization in Government service is not a constitutionally-protected right, as the Court sees it. It is a right that is granted by grace and it is within the

province of the Legislature and the President to determine the limits of that right and how it should be exercised. . . ."

In *Bauch v. City of New York,* 21 N.Y. 2d 599, 289 N.Y.S. 2d 951, 67 L.R.R.M. 2994 (1968), *certiorari denied,* 393 U.S. 834, 69 L.R.R.M. 2435, the Court of Appeals for the State of New York spoke of depriving a union or its members of their right of freedom of association guaranteed by the First and Fourteenth Amendments of the U. S. Constitution. It found the Petitioners' claim lacked substance and

> "[T]hat nothing in the City's labor policy denies members of the petitioners union the right to meet, to speak, to publish, to proslytize, and to collect dues by the means employed by the thousands of organizations of all kinds, that do not have the benefit of a dues check-off."

The City respectfully contends that Charlotte is in exactly the same situation with respect to the Union Officers. There is no allegation that the City has ever denied the Union Officers or other members of the Union, the right to belong to a union, meet together, conduct union business, or join in any other activity of the union. There is only the allegation that the refusal to grant union dues check off has hindered or prevented them from joining together in associational activities for the betterment of the community, to hire legal counsel and to negotiate for a group insurance program (App. 25, 51, 52).

The City does not believe it has the responsibility of assisting the union members in the financing of the union's activities, the hiring of legal counsel, or the payment of officers salaries, and a group life and medical insurance program is available to them as City employees.

Chief Judge Arraj of the U. S. District Court of Colorado in *Local 858, American Federation of Teachers v. School District No. 1,* 74 L.R.R.M 2385, (1970) agreed with the decision in *Bauch, supra* saying:

> "[T]hat neither the First Amendment nor any other constitutional provision entitles a public employees' union which has lost a representative election to the special aid of a public employer's collection and disbursing facility."

If it is not a violation of a constitutional provision to deny union dues check off where there is a labor contract, then there can be no constitutional violation absent a contract as in the case before this Court.

The City respectfully contends that the case before this Court should not have been decided on the basis of equal protection as guaranteed by the Constitution. Justice Stewart in *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), articulates the limits of the fundamental rights rationale employed by the Supreme Court:

> "The Court today does not 'pick' out particular human activities, characterize them as 'fundamental' and give them protection . . . To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives that right no less protection than the constitution itself demands." Id. at page 620.

B. Dues Check Off is a Part of the Collective Bargaining Process.

Historically, dues check off has been considered an item of negotiation and a part of a collective bargaining agreement. Absent a statute, ordinance, or labor contract requiring check off, it is not a matter of right protected under 42 U.S.C.A., §1983.

The U. S. Court of Appeals for the First Circuit in *National Relations Board v. Reed & Prince Mfg. Co.,* 205 F. 2d 131,

certiorari denied, 346 U.S. 887, 74 S. Ct. 139, 98 L. Ed. 391 (1953) stated:

> "On the check-off proposal, the company registered its opposition, mainly on the ground that this was not a proper subject of collective bargaining. In this the company was mistaken."

However, in the case before this Court, the U. S. Court of Appeals for the Fourth Circuit chose not to rely upon the City's authorities in its brief because the Court said in the cases cited, the request for withholding arose and was denied in the context of collective bargaining (A-5, Petition for Writ of Certiorari). The City strongly contends that as a public employer, it has the right to withhold the granting of dues check off even though the question is not raised in the context of collective bargaining. If the City were involved in a collective bargaining agreement with Local 660, the decision on this question would have undoubtedly been to the contrary.

To the City's knowledge, the instant case is the only decision of a Federal Court of Appeals on the question of union dues check off in which the Equal Protection Clause of the Fourteenth Amendment has been applied.

However, in January of 1975, a similar suit was brought by a labor union in Alabama. In *American Federation of State, County, and Municipal Employees Union, AFL-CIO, Local No. 2557, et al., v. Melvin Bailey, Sheriff of Jefferson County, Alabama, et al.,* Civil Action No. 75-M-0021 in D.C.N.D., Southern Division, Decided, March 17, 1975, an unreported decision, Local 2557 alleged, among other things, that the sheriff had refused to grant the union members dues check off, while allowing deductions for other things. The union also alleged that the reason for the refusal of dues check off was to hinder its members in the exercise of their rights to form and belong to a union.

Chief Judge Frank H. McFadden dismissed the union's claim for dues check off saying that the allegation of a deprivation of rights under the Equal Protection Clause of the Fourteenth Amendment was not sufficient to state a claim. Judge McFadden declined to follow the decision in the Local 660 case, and his opinion very adequately expresses the City of Charlotte's concept of the question of union dues check off:

> "Union dues check-off is a familiar part of the collective bargaining process in the private sector. It is, at the very least, a permitted subject for collective bargaining under the NLRA. Check-off is a frequent component of union contracts. It is apparent that check-off is so closely intertwined with collective bargaining that it is impossible to speak of it outside the context. This close identification of dues check-off with collective bargaining raises an unsurmountable [*sic*] barrier for the plaintiffs. Since plaintiffs may not force defendants to the bargaining table for general negotiations, the plaintiffs may not force defendants to bargain about one item that is inextricably part of the general collective bargaining process. The Court is not in a position to grant plaintiffs part of the fruits of collective bargaining when they are not entitled to any of those fruits. In the private sector, the employer need not grant a union demand for dues check-off. 29 U.S.C.A. §159(d)."
>
> "... [P]laintiffs are left in the position where they do not have the same rights as private employees, and yet are demanding, as a matter of right, an item private employees can only hope to acquire through negotiation. The Court will not create a situation where public employees have at once more, and less, rights than private employees, under the present state of the law." (Full opinion appended to this brief).

In Alabama, as in North Carolina, municipalities have no duty or authority to enter into collective bargaining agreements under state law.

Although the National Labor Relations Act is inapplicable to states and their subdivisions, Sec. 302(c)[1] of that Act clearly demonstrates that Congress was not indifferent to the subject of check off of membership dues. The term "permits" in Sec. 302(c) denotes Congress had no intention of making dues check off mandatory.

Certiorari was denied on the question of Federal legislation and state legislation in regard to the check off. In *State of Utah v. Montgomery Ward,* 120 Utah 294, 233 P. 2d 685, (1951), *certiorari denied,* 342 U. S. 689, 72 S. Ct. 111, 96 L. Ed 654, the Utah Supreme Court held that a Utah state statute requiring employers to honor all check off irrespective of whether a collective bargaining agreement existed was preempted by Sec. 302(c)(4) of the NLRA. In the opinion, the Court stated:

> "Congress has effectively preempted the entire field of legislation in regard to the check-off. There is no room for the States to narrow or enlarge upon the exceptions without conflicting with the policy of Congress." 233 P. 2d at 688, 689.

More recently the District Court for the Northern District of Georgia relied on this decision in *SeaPAK v. Industrial Technical & Professional Employees Division of National Maritime Union,* 300 F. Supp. 1197 (1969), *re-hearing den.,* (5th Cir., 1970), 423 F. 2d 1229. Chief Judge Lawrence held

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[1]"Sec. 302(c) permits an employer to check off membership dues from the wages of those employees who have delivered to him an assignment executed in accordance with the provisions of that section." One of the stipulations attached was that the wage assignment not extend beyond the termination of the applicable collective agreement.

that the Georgia "Right to Work" Statute, which provides that union dues may be deducted by employers only on the individual order or request of an employer, revocable at will, was invalid. The Court's reasoning was that the provision was an effort to legislate in a sphere preempted by Congress with respect to the check off of union dues.

If the Union Officers are to have the right to dues check off, it must come from federal legislation, and the courts should not seek to legislate in this area.

The City respectfully asks this Court to look beyond the form of the pleadings which seek to equate dues check off to payment of insurance premiums and other fringe benefits, and to consider dues check off as a part of the collective bargaining process.

C. The Decision in this Case has Prompted Similar Lawsuits in other Cities, and Will Have a Far-Reaching Effect on Employer-Employee Relations.

Consideration of the question involved in this case is of practical importance because the decision of the lower courts has already had a substantial effect on municipal employer-employee relations.

In addition to *Strojny v. Rousakis, supra* and *Local 2557 v. Bailey, supra,* previously discussed, the City has knowledge of at least three other lawsuits which have been filed in other cities with essentially the same allegations and set of facts:

Jackson Firefighters Assoc., Local 87, et al., v. City of Jackson, Mississippi, et al., Civil Action No. J75-190(R) (D.C. S.D., Miss.), Jackson Division, September, 1975.

Fraternal Order of Police, Wallace Earle Nesbitt Lodge No. 25, et al., v. City of Newport News, et al., (D.C.E.D., Va.), Newport News Div., Civil Action No. 75-93-NN, filed October, 1975.

Local 995, International Association of Firefighters, et al., v. City of Richmond, et al., Civil Action No. 75-0341(R), (D.C. E.D., Va.), filed July 29, 1975.

In each of these complaints, unions have claimed that equal protection of the law has been violated because dues check off has been denied while other types of withholdings have been allowed. As a result of the decision in the case presently before this Court, the unions, by an extension of equal protection rights, have seized upon a means of *forcing* municipalities to grant dues check off without having to go through the *rigors* of employer-employee negotiations.

The City respectfully urges this Court that the lower courts' decision has improperly created a substantive constitutional right in applying the Equal Protection Clause of the Fourteenth Amendment to the subject of union dues check off.

In delivering the opinion in *San Antonio School District v. Rodriquez*, 411 U. S. 1, 36 L.Ed. 2d 16, 93 S. Ct. 1278 (1973), Justice Powell stated:

> "It is not in the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." at p. 43.

It is particularly unfortunate that such a substantive right be accorded to the unions by the courts rather than legislative bodies. If such a right is to be accorded, the City respectfully suggests to this Court to allow appropriate legislative bodies to grant this privilege, while establishing some administrative body to arbitrate the inevitable disputes which must occur.

In *Atkins, et al. v. City of Charlotte, et al.*, 296 F. Supp. 1068, (1969) (W.D.N.C.), a three-judge court was convened to determine the validity of North Carolina General Statute 95-98 which prohibits a municipality in North Carolina entering into a collective bargaining agreement with a union or

trade association. The Court upheld the validity of the statute, and in delivering the opinion for the Court, Circuit Judge Craven stated:

> "The solution, if there be one, from the viewpoint of the firemen, is that labor unions may someday persuade state government of the asserted value of collective bargaining agreements, but this is a political matter and does not yield to judicial solution. The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution. The State is within the powers reserved to it to refuse to enter into such agreements and so to declare by statute." at 1077.

The City suggests to the Court that if this decision is allowed to stand, the court system will be cluttered by numerous cases in which litigants seek to prove that various classifications of withholdings which deny dues check off are a denial of equal protection of the law.

D. The Effect of Future Legislation on the Decision in this Case.

As discussed in the Petition for Certiorari, the City has a substantial interest in retaining a discretionary posture relative to union dues check off in the event federal legislation is enacted with regard to collective bargaining for local government employees.

It is entirely conceivable that within the next two years, Congress will enact legislation which would place municipal employees under the jurisdiction of the National Labor Relations Board, or some other administrative agency, thereby requiring collective bargaining. There are presently pending in the U. S. House of Representatives two such bills, *HR 77* and *HR 1488*. If such legislation is enacted, and there is a good possibility that it will be, then the City, by this decision,

will be locked in with a judicially ordered requirement for dues check off.

Many years of experience with labor strife in the public sector has indicated the desirability of having a body such as the NLRB available to arbitrate and settle disputes between the parties. With the rapid increase in unionization of public employees, it is likely that Congress will take some action that will create a collective bargaining framework for municipal government and its employees.

The City respectfully urges this Court not to step into an area where Congress appears likely to act. The judiciary should refrain from imposing remedies that are properly within the province of legislative bodies.

II. The City of Charlotte has Established a Rational Basis for Denying Dues Check Off to City-employed Firemen who are Members of a Labor Union.

A. The Constitutional Standards for Classification.

If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and is based upon substantial distinctions with a proper relation to the objects classified and the purposes sought to be achieved, as long as the law treats all members of the class alike, it is not a violation of the federal guaranty of the equal protection of the laws. *16 AmJur 2d,* §502.

The general rule is well settled by unanimity of the authorities that a classification to be valid must rest upon material differences between the persons, activities, or things included in it and those excluded. *16 AmJur 2d, §500. Old Dearborn Co. v. Seagram Distillers Corp.,* 299 U. S. 183; *State Tax Comrs. v. Jackson,* 283 U. S. 527.

The Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out. However, the Constitution does not require things which are different in fact, to be treated in law as though they were the same. In defining a class subject to legislation, the distinctions that are drawn must have some relevance to the purpose for which the classification is made. *Rinaldi v. Yeager,* 384 U. S. 305, 308, 86 S. Ct. 1497, 1499, 16 L.Ed. 2d 577 (1966).

The City respectfully submits that the lower courts' decision in applying the Fourteenth Amendment to the issues involved was completely in error. The obvious difference between dues check off for the benefit of a union and ordinary payroll deductions for employee fringe benefits, should in itself establish the rational basis for classifying dues check off in a separate category.

The District Court in this case concluded that once the City offered the benefits of withholding to certain organization and entities, the City, under the Fourteenth Amendment, must administer such a withholding program in a fair and equitable manner, citing *Griffin v. School Board of Prince Edward County,* 377 U. S. 218 (1964), (A-12, Petition for Certiorari). The *Griffin* case dealt with desegregation—the closing of the public schools in Prince Edward County, Virginia to avoid the desegregation ordered by the U. S. Supreme Court. The acts complained of in *Griffin* were calculated to accomplish a totally impermissible objective.

There can be no impermissible objective in the City's refusing dues check off when no legislation requires it and, as discussed earlier, dues check off is a privilege which can be granted or taken away. In the lower courts' decision, there was no finding that the Union Officers had been denied union dues check off because of an impermissible objective. It is difficult to believe that this decision could have been made on the authority of *Griffin* because the Union Officers had no

right to dues check off for the benefit of the union, whereas, the children of Prince Edward County had every right under the Constitution to a public education. There is no analogy in the holding in *Griffin* to the denial of dues check off for the benefit of a union.

In *McGowan v. Maryland*, 366 U. S. 420 (1961), 6 L.Ed. 2d 393, 81 S. Ct. 1101, employees of a discount store were under indictment for selling articles in violation of Maryland's Blue Law. Maryland exempted bathing beaches, bath houses, dancing saloons and amusement parks and the retail sales of merchandise customarily sold there from the operation of the Blue Law, while prohibiting these articles to be sold at other retail establishments. In considering the case, Chief Justice Warren said "[t]he standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objectives. State legislatures are assumed to have acted within their power despite the fact that in practice their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it. *Kotch v. Board of River Port Pilot Comrs.*, 330 U. S. 552, 91 L.Ed. 1093." (Other citations omitted) 81 S. Ct. at 1105.

In the *McGowan* case, the Court found that a legislature "could reasonably find that these commodities necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are most likely to be immediately put to use". "Such a determination would seem to serve the consuming public

and at the same time secure Sunday rest for those employees, like appellants, of all other retail establishments." 81 S. Ct. at 1106. "The fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature does not render the statute violative of equal protection since there appears to be valid reasons for the exemptions." 81 S. Ct. at 1105, 1106.

In a separate, but concurring opinion, in *McGowan*, Justices Frankfurter and Harlan were of the view the "claimant who challenges a discriminatory statute bears the burden of affirmative demonstration that in the actual statement of facts which surround its operation, its classifications lack rationality." 81 S. Ct. 1153 at 1194.

The City does not believe that the Union Officers, in instant case, have demonstrated a lack of rationality.

B. The City has Established a Policy with Respect to Voluntary Payroll Deductions which Satisfies the Constitutional Requirements.

The decision of the lower courts stated that the City had not established clear and fair standards, but that it had a *practice* of allowing deductions from employees' pay where the option was available to all employees, or all employees within a single unit, such as the Fire Department (A-10, Petition for Certiorari). (Emphasis added).

The City respectfully submits that whether one calls the City's policy a practice, a pattern, a standard, a program, or a guideline, and whether it is written or unwritten makes no difference. What is necessary, however, is that the legislative body of the City must determine which deductions shall be classified as permitted, and which shall be excluded, and establish a rational basis for this classification. The City believes that it has established a rational basis for refusing to grant dues check off. The standards are fair and clear.

Dues check off has been consistently denied to all labor organizations because they are special interest groups. Affidavits of the City Manager (App. 53-55) and the Personnel Director (App. 43-45) set forth the City's policy. The fairness of the policy is shown by the Personnel Director's statement that each request for a payroll deduction is considered to determine whether or not all employees of the City would be benefited by the deduction, and whether or not such a benefit would outweigh the administrative burden which would be imposed on the City (App. 44). It would appear that the procedure for making the determination is clear.

The City offered into evidence a list of permitted deductions (App. 16, 17, 32-34). The following deductions are required by law:

(a) Federal income tax
(b) State income tax
(c) North Carolina Firemen's Retirement System (App. 33, Ex. 1, p. 35)
(d) N. C. Local Government Employees Retirement System (App. 33, Ex. 2, p. 36)
(e) City, County, State tax levy (App. 33, Ex. 3, p. 37)

The only other permitted payroll deductions are:

(f) Medical and life insurance—The City has a contract with Life of Virginia, in which it participates, to provide a group insurance program for all of its employees.
(g) Firemen's Benefit Fund — Lincoln National Life — A group life insurance plan available to all firemen.
(h) Firemen's Credit Union—A savings and loan program available to all firemen.
(i) Ætna Deferred Compensation Plan—Available to all employees

(j) Firemen's Voluntary Pledge Fund—Not a regular deduction but is withheld from the wages of firemen, on request, only upon the death of an employed fireman for the benefit of his survivors. (p. 9, Petition of Certiorari)
(k) United Way—Available to all employees—a community charity organization enables an employee to make a charitable contribution for the year in small weekly payments.

The law is well settled to the effect that the courts are without the power to compel legislative bodies by injunction or otherwise, to enact specific pieces of legislation, or follow particular courses of action. The authority of making specific payroll deductions is a matter peculiarly within the discretion of the City Council of the City of Charlotte.

There are a number of cases involving judicial interference with the legislative function, and the courts have continually held that the judiciary may not supply what the legislature has studiously omitted.

> "It is the business of the courts to execute the law as they find it and not to make or modify it by interpolating qualifications which do not appear in the law itself." *International Bank v. Sherman,* 101 U. S. 403.

> "The United States Supreme Court lacks both authority and competence to assume the legislative role." *San Antonio Independent School District v. Rodriquez,* 411 U. S. 1, 93 S. Ct. 1278.

While the policy of the City Council of the City of Charlotte to permit optional payroll deductions only when they benefit all employees, or employees of a single unit, may serve to impose an alleged hardship on particular groups of employees, the Court should not interfere.

C. The City's Objective in Denying Dues Check Off Does Not Violate the Fourteenth Amendment.

Dues check off and several other requests (App. 43-45) received by the City have been found to lack conformity with the guidelines of the City's policy (App. 55). Dues check off is so inherently different from the other payroll deductions offered to City employees, that the reason for classifying it differently is self-evident. There is a material difference between the things included in the class of permitted deductions and the items in the class which are not permitted, (i.e., deductions which benefit special interest groups).

It has been held by the Court of Appeals in Arizona that a school board may, without violating equal protection, grant teachers the right to payroll deductions for whatever purposes desired while withholding the same privilege from non-teacher employees. *Edwards, et al. v. Alhambra Elementary School District No. 63*, 488 P. 2d 498, 15 Ariz. 293 (1971). Dues check off was one of the privileges granted. The Court denied rehearing and review.

A practical reason for establishing a system of classification of payroll deductions is the expense and administrative burden which an unrestricted payroll deduction plan would impose on the City (App. 45, 55). While employees' pay accounts are computerized, if the City were required to offer an unrestricted program to its employees, there undoubtedly would be many additional requests and the expense would increase. The fact that the District Court found that dues check off would be no more difficult than processing deductions for any existing programs (A-11, Petition for Certiorari), is a controverted question and no evidence on this point was placed before the Court.

Assignment of wages was the subject of a suit before the South Carolina Supreme Court in *Pacific Mills v. Textile Workers Union of America, Local 254*, 197 S. C. 330, 15 S.E.

134(1941). The employer, Pacific Mills, refused to enter into a contract with the union which contained a provision for union dues check off. A number of union members presented a partial assignment of their wages for the benefit of the union. The question before the court was whether the employer should be required to honor these assignments. Justice Baker pointed out that "[i]f appellant [Pacific Mills] be compelled to recognize these partial assignments, either in law or equity, then all or other partial assignments which may be executed and delivered by appellants' employees would likewise have to be honored and carried to a logical conclusion, and appellant would have to do a banking business insofar as open checking accounts are concerned."

An unrestricted withholding policy would also increase the possibility of liability on the part of an employer who withholds pay, particularly in a situation, between a union member and his union.

The City respectfully submits that its objective in denying check off is not impermissible, but rational, and does not violate the Fourteenth Amendment.

III. North Carolina General Statute §95-98 Prohibits Dues Check Off in that Check Off is an Agreement in which the Union is a Third Party Beneficiary.

North Carolina General Statute 95-98 (printed in full at page 5 of this brief), prohibits contracts or agreements between units of government and labor unions as bargaining agent for any public employee. The constitutionality of the statute was upheld in *Atkins, et al. v. City of Charlotte, et al.*, 296 F. Supp. 1068 (W.D.N.C. 1969).

On the basis of this decision, in July of 1969 the Office of the Attorney General of North Carolina issued an opinion which stated that:

"Since the check-off agreement deals with a segment or functioning of collective bargaining with the labor union, it is expressly prohibited by G. S. 95-98 . . . and the City of Charlotte has no authority of law and is expressly prohibited from operating or making any deductions or check-off from its employees' wages for the purposes of paying union dues . . ."

"The city employees wanted a labor union or labor organization and the three-judge federal court said they could have it but the union will have to see to its own financing without the aid of the city for the city is prohibited by law from entering into any such agreement or exercising such assumed authority even in the absence of an agreement." Vol. 40, *N.C.A.G.*, 591 (App. 38-41, Ex. 4).

The City respectfully contends that before check off could be accomplished, it would be necessary for the City to enter into an agreement with each employee that a portion of the employees wages would be paid over to the union for its benefit, in effect making the union a third party beneficiary under the agreement.

If the Courts require the City to grant dues check off, they would, in effect, be requiring the City to bargain collectively with the union through its members, which would either violate at a minimum or circumvent N.C.G.S. 95-98.

IV. The Findings of Fact Affirmed by the Fourth Circuit Court of Appeals were not Supported by the Evidence.

Based upon the pleadings, affidavits, discovery and arguments of counsel, the District Court made certain findings of fact. It is questionable whether or not a trial court should make findings of fact when granting summary judgment. Such a practice has been a subject of discussion many times by the federal courts.

Rule 52 of the Federal Rules of Civil Procedure exempts the resolution of summary judgment motions from the requirement of making fact findings. This is so because such a motion is not a proper procedure for resolving factual disputes. Judge Craven, (now Circuit Judge), properly analyzed the role of facts in summary judgment motions in two decisions rendered while sitting as a District Court Judge. As he noted, a trial court is not empowered to make findings of fact, but only to determine that no factual dispute exists. Of course, in order to decide that the facts are not controverted, a trial judge must ascertain what the facts actually are. *Wehrle v. Brooks*, 269 F. Supp. 785, 788 (W.D.N.C., 1966). But once this point is reached, facts are recited, if at all, only to demonstrate the appropriateness of the case for summary judgment. *Manning v. State Farm Automobile Insurance Company*, 243 F. Supp. 619, 620 (W.D.N.C. 1965). While some appellate courts have criticized including findings of fact in a summary judgment order as implying the existence of factual differences, the better rule would appear to be that the inclusion of the factual basis for the decision assists an appellate court in the review process. *Compare General Teamsters, Chauffeurs & Helpers Union v. Blue Cab Company*, 353 F. 2d 687, 689, (7th Cir., 1965) *with Fromberg, Inc. v. Gross Manufacturing Company*, 328 F. 2d 803, 806 (9th Cir., 1964). The corollary to this principle must be that a trial court may not go beyond the record or matters susceptible to judicial notice to assert a factual basis for its legal conclusion. In a trial situation, such "findings of fact" would be subject to being dismissed as "clearly erroneous" under Rule 52. In a summary judgment setting, it can only mean that the movant in whose favor the "facts" are "found" has failed to establish his entitlement to summary judgment.

It appears from the above, that the Union Officers are not entitled to a summary judgment. Their entitlement to such

a judgment is lacking because certain of the facts were in dispute. The City made a motion for summary judgment in the belief that it was appropriate for the City, and still believes this to be the case. However, the City is not asking this Court to remand this case for a trial on the merits, because the questions involved are basically questions of law. It is respectfully urged that this Court reverse the lower courts and grant summary judgment for the City.

The District Court misstated certain facts and has drawn certain conclusions which are in dispute.

In Finding of Fact No. 7, the trial court found that "[d]efendants have not denied any requests for payroll deductions from any persons or organizations in the Fire Department within the past ten years except the plaintiffs' [Union Officers] requests." (A-10, Petition for Certiorari). The City respectfully contends that this finding is inaccurate, not supported by the evidence and misleading because it restricts consideration of the City's policy with respect to deductions to Fire Department personnel. To be accurate, the finding of fact with respect to this item should have found that twelve requests for withholding have been denied to City employees since 1968 including those requests from the Union Officers (App. 43, 44). The Fire Department employees should not have been considered in a separate category so that this finding was restricted to them.

In the Personnel Director's Affidavit, he stated under oath that the North Carolina Firemen's Association requested assessment of $3.00 yearly dues check off and was denied (App. 44). This, in itself, shows that Finding of Fact No. 7 is not supported by the evidence and is controverted.

In Finding of Fact No. 10, the trial court found that withholding union dues from the wages of the firemen would be no more difficult than processing the deduction for any of the City's existing programs. (A-11, Petition for Certiorari).

Surely, the trial court cannot believe that if dues check off was granted under Fourteenth Amendment rights, the City could then deny any other organization or individual employee the right to deductions upon request. An unrestricted and wide open right to withholding would be a substantial burden on the City and that is a disputed fact. (App. 45, 55).

For the above reasons, the City respectfully urges the Court that summary judgment should not have been issued in favor of the Union Officers, and this decision should be reversed.

CONCLUSION

Based upon all of the foregoing, it is respectfully submitted that the decision of the lower courts must be reversed and Summary Judgment issued in favor of the City of Charlotte.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES UNION, AFL-CIO, LOCAL NO. 2557; et al.,
Plaintiffs

- v -

MELVIN BAILEY, Sheriff of Jefferson County, Alabama; et al.,
Defendants

CIVIL ACTION NO. 75-M-0021

Filed in Clerk's Office
No. Dist. of Alabama
Mar. 17, 1975

ORDER

This cause came on to be heard on defendants' motions to dismiss the complaint. The Court has examined the pleadings, considered the briefs ubmitted by the parties and has heard the oral argument of counsel. The Court is of the opinion that the motions are due to be granted in part and overruled in part.

I

Paragraph 5 of the complaint is due to be dismissed. Plaintiffs allege a deprivation of rights under the Equal Protection Clause of the fourteenth amendment in that defendants refuse to allow a voluntary deduction from employee pay checks for union dues. This contention is not sufficient to state a claim, under present law.

Union dues check-off is a familiar part of the collective bargaining process in the private sector. It is, at the very least, a permitted subject for collective bargaining under the NLRA. Check-off is a frequent component of union contracts. It is apparent that check-off is so closely intertwined with collective bargaining that it is impossible to speak of it outside that context.

This close identification of dues check-off with collective bargaining raises an unsurmountable barrier for the plaintiffs. The sheriff and the County Commission have no duty to bargain with any representatives of the employees under Alabama or federal law. *AFSCME, Local 2557, et al. v. Bailey, et al.*, C.A. No. 73-P-199-S (N.D. Ala., June 13, 1973, Dec. 19, 1973) (hereinafter *Bailey I);* 29 U.S.C.A. §152(2). Since plaintiffs may not force defendants to the bargaining table for general negotiations, the plaintiffs may not force defendants to bargain about one item that is inextricably part of the general collective bargaining process. The Court is not in a position to grant plaintiffs part of the fruits of collective bargaining when they are not entitled to any of those fruits.

Moreover, the plaintiffs are seeking an order of the Court to force defendants to allow union dues check-off. In the private sector, the employer need not grant a union demand for dues check-off. 29 U.S.C.A. §158(d). If such a provision is included in the final contract, it is the product of the give and take of the bargaining process, perhaps with the union conceding a point in order to obtain the benefits of the check-off. In the case at bar, plaintiffs, who do not have any collective bargaining "rights," wish the Court to give them a benefit they would not necessarily obtain if they could force defendants to bargain. Thus, the plaintiffs are left in the position where they do not have the same rights as private employees, and yet are demanding, as a matter of right, an

item private employees can only hope to acquire through negotiation. The Court will not create a situation where public employees have at once more, and less, rights than private employees, under the present state of the law in this area.[1]

Under the foregoing analysis, the plaintiffs are unable to state any set of facts under which they would be entitled to the relief they request. They are foreclosed by law. The Court declines to follow *Local 660, International Association of Fire Fighters v. City of Charlotte,* No. C-C-73-236 (N.D. N.C., September 4, 1974).

II

Paragraph 6, 7 and 8 do state a claim on which relief can be granted, even though paragraph 6 suffers a lack of clarity and precision. Defendants argue that *Bailey I* forecloses this Court from acting on at least some of the issues raised by these paragraphs, or that plaintiffs are due to be remitted to their right to seek a contempt citation for disobedience of the judgment entered in *Bailey I* before the judge who decided that case. This problem is more apparent than real, as the Court does not foresee any problem in conforming its action to the principles laid out in *Bailey I*, and will not be slow to remedy any contravention of the order entered by Judge Pointer. The fact that this Court is composed of a number of judges does not affect its essential unity.

Defendants also raise the question of whether plaintiffs should be required to state these claims as compulsory counterclaims in *Bailey v. AFSCME, Local 2557, et al.*, C.A. No.

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[1]Defendants also contend that paragraph 5 is barred as res judicata from *Bailey I*. While the Court need not reach this point, given its disposition of paragraph 5, it would note that *Bailey I* was concerned with the first amendment rights of deputy sheriffs, and not their fourteenth amendment rights. The findings made in *Bailey I* expressly do not foreclose the issue of dues check-off. Under these circumstances, defendants' position does not seem well-taken.

188-000, Circuit Court for the Tenth Judicial Circuit of Alabama, under Rule 13(a), Ala. R. Civ. Pro. The Court sees this as a question of comity, and deems it inappropriate to deprive plaintiffs of their federal forum at this point in time.[2] The Court will take the proper action to avoid any undue interference with the state court action, should the need for such action arise in the future.

III

Accordingly, it is ORDERED, ADJUDGED and DECREED that defendants' motions to dismiss be, and the same hereby are, granted as to paragraph 5 of the complaint. In all other respects the motions are overruled. Paragraph 5 of the complaint is hereby dismissed. Defendants shall answer the remaining claims within thirty days of the date of this order.

Done this 17th day of March, 1975.

s/ FRANK H. MCFADDEN
Chief Judge

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[2]The Court has been informed by counsel that the state court action, which dealt with injunctive relief against a "sick-out" by the deputies, is essentially over. The Court notes that the temporary restraining order entered in the case ran out, at the end of the last consent extension, on February 14, 1975.